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Impact of the United States International Trade Commission on Commercial Transactions

Italo H. Ablondi*

Pamela A. McCarthy**

I. Introduction

The impact of the decisions and actions of the United States International Trade Commission (ITC) upon international commercial transactions is not only far-reaching but also triggers an enormously varied response.¹

II. History of the ITC

The ITC was originally created as the Tariff Commission in 1916² following increased pressure on President Woodrow Wilson by groups such as the United States Chamber of Commerce and the American Federation of Labor.³ The majority of labor and business groups at that time favored establishment of a tariff commission. Historically, tariffs had played an essential role in production of revenue. Until approximately 1910, revenue from customs duties had accounted for between fifty and ninety percent of total federal income.⁴ With passage of the sixteenth amendment to the Constitution, which permitted imposition of income taxes, the importance of tariffs to the overall revenue scheme of the United States diminished greatly. More recently, customs duties have accounted for no more than two percent of the United States Government's total income,

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1. This Article surveys the various powers of the ITC, the role played by the Commission in federal policy decision making with respect to international commercial transactions on a national scale, and the impact of such decisions in the economic sphere.

2. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756, 795.

3. J. DOBSON, *TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION* 87 (1976) [hereinafter cited as DOBSON].

4. L. SCHMECKEBIER, *THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 165-68 (1924).

but are significant in absolute terms, accounting for over ten billion dollars per year.⁵

As originally organized in 1916, the Tariff Commission consisted of six members with no more than three members from any one political party.⁶ This predetermined membership assured a bipartisan Commission and has remained an element of the Commission's composition for more than the last sixty years. The relatively long, overlapping twelve-year terms, when coupled with the possibility of reappointment, were designed to ensure the independent nature of the Commission. An exemplar of that system was Commissioner Edgar D. Brossard, who served for thirty-four years before retiring in 1959. The term of appointment for Commissioners has varied over the years from twelve to six, to the current nine years.

In 1916 the Commission's responsibilities were predominately of a fact finding nature and included investigating the effects of customs laws, rates and duties on domestic industry, as well as providing Congress with an annual report of its activities.⁷ The Tariff Act of 1922 expanded the responsibilities of the Commission to include investigations of unfair trade practices.⁸ To carry out this responsibility, the Commission was authorized to conduct hearings after notice to interested parties. The procedure followed by the Commission in these unfair practices cases, as well as in its analysis of tariff rate changes, was time consuming. The procedure required a hearing, followed by a staff report to the Commissioners, who voted on the staff recommendation and then advised the President.

In 1930 Congress enacted another major piece of legislation affecting the Commission. The Smoot-Hawley Act, or the Tariff Act of 1930,⁹ reorganized the Commission and established general duties, such as investigations of unfair import practices under section 337.¹⁰ Such duties are still a major element of the ITC's responsibilities. The Smoot-Hawley Act is recognized, however, as the most restrictive trade law in our history.¹¹ Critics blamed Smoot-Hawley for decreased exports and increased unemployment.¹²

The next significant change for the Commission resulted from

5. U.S. CUSTOMS SERV., DEP'T OF TREASURY, MEMORANDUM ON CUSTOMS COLLECTIONS IN FISCAL 1984 (Nov. 1984).

6. Revenue Act of 1916, *supra* note 2, at 795.

7. *Id.* at 795-98.

8. Tariff Act of 1922, Pub. L. No. 67-318, § 316, 42 Stat. 858, 943-44.

9. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590.

10. *Id.* at 703 (codified as amended at 19 U.S.C. § 1337). Two early cases in which the Commission found infringement were Russian Asbestos, Investigation No. 337-1 (U.S. Tariff Comm'n. 1933) and Cigar Lighters, Investigation No. 337-6 (U.S. Tariff Comm'n 1934).

11. E. ROSSIDES, U.S. CUSTOMS TARIFF AND TRADE 5 (1977) [hereinafter cited as ROSSIDES].

12. DOBSON, *supra* note 3, at 34-35.

passage of the Customs Simplification Act of 1954.¹³ That act amended the Antidumping Act of 1921¹⁴ to provide the Commission with authority to determine whether importation subject to an antidumping investigation was injuring or otherwise interfering with the domestic industry.

As a result of the Trade Expansion Act of 1962,¹⁵ which created the Office of Special Trade Representative for purposes of directing trade negotiations on behalf of the United States, the Commission was given responsibility to review the probable economic effect of possible tariff concessions on the United States market. In addition to providing necessary authorization for reduction of tariffs, the Trade Expansion Act of 1962 outlined procedures in section 301(b) for industry to obtain relief from injury under the escape clause.¹⁶ It was the Commission's responsibility to determine whether serious injury had or threatened to occur to a domestic industry as a result of a trade agreement concession. The relief provided by the Act included increases in the rate of duty, imposition of a quota, or other import restrictions.¹⁷

The Trade Act of 1974¹⁸ renamed the Tariff Commission as the International Trade Commission (ITC), in recognition of its expanded responsibilities. The number of Commissioners remained six, but their term of appointment was extended from six to nine years. It was under section 201 of the 1974 Act that the ITC's authority under the escape clause was broadened.¹⁹ Many recent import relief requests, including footwear, steel, copper, tuna, and stainless steel flatware, have been brought for Presidential action under section 201.²⁰ The ITC's new name more accurately described the objectives and responsibilities with which it was vested, because tariffs were no longer the cornerstone of international trade policy nor the primary

13. Pub. L. No. 83-768, 68, Stat. 1136 (1954).

14. Pub. L. No. 67-10, 42 Stat. 11 (1921).

15. Pub. L. No. 87-794, 76 Stat. 872 (1962).

16. *Id.* at 884; § 301(b) of the Act states:

(b)(1) Upon the request of the President upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon the filing of a petition under subsection (a)(1), the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.

17. Trade Expansion Act of 1962, *supra* note 15, at § 301(c), 311.

18. Pub. L. No. 93-618, 88 Stat. 1978 (1975).

19. *Id.* at 2011-14 (codified as amended at 19 U.S.C. § 2251(b)).

20. Nonrubber Footwear, 49 Fed. Reg. 29,161 (1984); Carbon and Certain Alloy Steel Products, 49 Fed. Reg. 30,807 (1984); Unwrought Copper, 49 Fed. Reg. 30,026 (1984); Certain Canned Tuna Fish, 49 Fed. Reg. 34,310 (1984); Stainless Steel Table Flatware, 49 Fed. Reg. 24,459 (1984).

responsibility of the ITC.

The Trade Agreements Act of 1979²¹ was enacted to authorize and implement the international trade agreements negotiated at the Multilateral Trade Negotiations (MTN) under the 1974 Act.²² Far and away the major modification respecting the ITC in the 1979 Act was in the area of countervailing duty and antidumping laws.²³ As with antidumping investigations prior to the Customs Simplification Act of 1954, countervailing duty investigations were handled entirely by the Department of Treasury. Pursuant to the President's Reorganization Plan No. 3 of 1979,²⁴ and Executive Order 12188,²⁵ the responsibility for economic determinations was shifted from the Department of the Treasury to the Department of Commerce. As noted above, the ITC had been empowered to determine injury in antidumping investigations in 1954. The 1979 Act granted the ITC authority to make injury determinations in countervailing duty investigations.²⁶

III. The Modern ITC

Today's ITC has broad authority to investigate a multitude of areas impacting international trade and commercial transactions. Under section 332 of the Tariff Act of 1930 for instance, the ITC may investigate a multiplicity of topics ranging from the competitive situation of the domestic telecommunications industry²⁷ to the possible effects of changing world crude petroleum prices on the United States industry and consumer.²⁸ Investigations such as those conducted under section 332 can only be initiated by the ITC, the Congress, or the President.²⁹ This is because of the broad national scope of the investigations.

As the ITC's investigatory powers are far-reaching, so is the impact of their recommendations. Although an investigation under section 332 will not result in an action directly affecting imports, such as a tariff increase or quota,³⁰ an investigation can affect the

21. Pub. L. No. 96-39, 93 Stat. 144 (1979).

22. *Id.* § 1(c) states: "Purposes - The purposes of this Act are—(1) to approve and implement the trade agreements negotiated under the Trade Act of 1974."

23. 19 U.S.C. §§ 1671-73 (1980).

24. 44 Fed. Reg. 69,273 (1979).

25. 45 Fed. Reg. 989 (1980).

26. 19 U.S.C. § 1671(a)(2) (1980).

27. U.S. INT'L TRADE COMM'N, PUB. NO. 1542, CHANGES IN THE U.S. TELECOMMUNICATIONS INDUSTRY AND THE IMPACT ON U.S. TELECOMMUNICATIONS TRADE, Investigation No. 332-172 (1984).

28. U.S. INT'L TRADE COMM'N, PUB. NO. 1494, POSSIBLE EFFECTS OF CHANGING WORLD CRUDE PETROLEUM PRICES, Investigation No. 332-161, (1984).

29. 19 U.S.C. § 1332(g) (1980).

30. Section 332 authorizes the ITC to investigate tariff relations, effects of customs on products, import costs of articles, etc. 19 U.S.C. § 1332(a)-(d). It does not, however, empower any body to recommend import relief. In contrast, § 201 enables the President to provide

future of commercial transactions in a particular industry because it can lead to Congressional or Administrative action. One result of ITC investigations is a practical response with which many businesses find themselves faced—that of organizing an association to address concerns raised by the ITC investigation. While an adversarial proceeding resulting in restraints may have severe consequences, none of the ITC's responsibilities can be discounted as any less important, as the impact of ITC recommendations and findings in these other proceedings can be equally severe.³¹

President Reagan, not unlike previous Presidents, has faced his share of controversial trade decisions. Decisions on import relief for the steel and copper industries, both of which were subject to section 201 investigations, were timed to force the President into controversial arenas at the most difficult time politically—the November 1984 Presidential election.³² Such timing makes the outcome of decisions less predictable, but potentially more damaging than highly protectionist measures faced during less volatile political periods.

The current ITC has demonstrated a hesitancy to pursue import relief in several industries. In the case of footwear, which was the subject of three section 201 petitions in less than ten years,³³ the ITC failed, in the most recent petition, to find sufficient injury to the domestic industry to recommend import relief.³⁴ The domestic footwear industry has faced increased competition from imports following removal of import relief measures established previously and it has had significant difficulty expanding into foreign markets. The effect of the ITC's refusal to recommend relief cannot be determined for several years. As a result of the ITC's decision not to act, Con-

import relief to remedy or prevent injury to the domestic industry. 19 U.S.C. § 2253. This relief can include an increase or imposition of duty, a tariff-rate quota, imposition or modification of a quantitative limitation on an import, an orderly marketing agreement, or any such combination. 19 U.S.C. § 2253(a) (1980).

31. U.S. INT'L TRADE COMM'N, Pub. No. 1479, THE EFFECTS OF FOREIGN PRODUCT COUNTERFEITING ON U.S. INDUSTRY, Investigation No. 332-158 (1984) [hereinafter cited as EFFECTS OF FOREIGN PRODUCT COUNTERFEITING]. As a result of the ITC's investigation, members of the Anti-Counterfeiting Coalition were successful in their efforts to require the President to consider the protection of intellectual property in decisions under the renewed U.S. Generalized System of Preferences. Trade and Tariff Act of 1984, Pub. L. No. 98-573 § 501(b)(9)(c), 1984 U.S. CODE CONG. & AD. NEWS 2948.

32. *Unwrought Copper*, *supra* note 20 (imports found to be of such increased quantities as to be substantial cause of injury to the domestic industry). President Reagan determined not to grant copper import relief, as inconsistent with national economic interest on September 11, 1984. Copper Import Relief Determination, 49 Fed. Reg. 35,609 (1984).

Carbon and Certain Alloy Steel Products, *supra* note 20 (found in favor of import relief for the domestic industry). President Reagan determined not to grant import relief to the steel industry on September 20, 1984. Steel Import Relief Determination, 49 Fed. Reg. 36,813 (1984).

33. See *Nonrubber Footwear*, *supra* note 20; Footwear, 42 Fed. Reg. 9065 (1977); Footwear, 41 Fed. Reg. 8432 (1976).

34. *Nonrubber Footwear*, *supra* note 20.

gress introduced legislation setting quotas on nonrubber footwear.³⁵

Industries which have been unable to keep pace with advanced technologies have been the target of a number of ITC investigations upon which Presidential decisions were made. In the area of specialty steel, it is believed that increased duties and quotas have eliminated most foreign sourced articles and have generally created higher prices for the domestic purchaser.³⁶ The ITC's recent recommendation to impose quotas on carbon steel is certain to have a similar impact.³⁷ Likewise, voluntary restraints agreed to by the Japanese for automobile imports have reportedly produced an inflationary effect on the price of new cars.³⁸ Japanese automakers are allegedly making an even greater return on United States car sales than previously.³⁹ One positive effect of the restraint was to give the American auto industry an opportunity to modernize and produce more efficient and competitive automobiles. Similarly, a forty-five percent duty on motorcycles imposed by the President inflated prices for both domestic and foreign motorcycles, and impacted heavily on consumers.⁴⁰

Only the passage of time reveals whether decisions to pursue or forego safeguard measures under section 201 are beneficial or detrimental to an industry. Indeed, the consumer may be the one who experiences the greatest impact from either decision. In the short run, however, it is the domestic industry that has the most to gain or lose. Thus, Commission decisions are not only far-reaching, but may distinctively alter the financial condition of any number of industries.

A. *Antidumping Duties—Section 731 Investigations*

In any analysis of the impact of ITC decisions on commercial transactions the significant effect of antidumping investigations and their ensuing remedies must be considered. The Antidumping Act of 1921 was the forerunner of today's antidumping law, which was en-

35. H.R. 5791, 98th Cong., 2d. Sess. (1984), Introduced June 7, 1984, by Rep. Olympia J. Snowe (R. Maine); Sen. William S. Cohen (R. Maine) introduced the same bill. (S. 2731, 98th Cong., 2d Sess. (1984)). H.R. 5791 was sent to the House Committee of Ways and Means, where no action was taken. The Senate Finance Committee conducted hearings on S. 2731 on June 24; no further action was taken. The legislation proposed to limit imports of nonrubber footwear to no more than four hundred million pairs per year into the United States market.

36. Stainless Steel and Alloy Tool Steel, 48 Fed. Reg. 22,373 (1983) (determination by the International Trade Commission).

37. *Carbon and Certain Alloy Steel Products*, *supra* note 20.

38. *World Bank President Raps Protectionism, Calls Auto VRA With Japan Self Defeating*, 9 U.S. IMPORT WEEKLY (BNA) No. 34, at 1070 (May 30, 1974).

39. *Japanese Government Has Vested Interest in Preserving Auto Quotas, Says Officials*, 1 INTERNATIONAL TRADE REPORTER, CURRENT REPORTS (BNA) No. 21, at 647 (Nov. 28, 1984).

40. Heavyweight Motorcycles, Engines and Power Train Subassemblies Therefor, 48 Fed. Reg. 6043 (1983).

acted by the Trade Agreements Act of 1979.⁴¹ The basic concept of antidumping law focuses on unfairly low priced imports to the United States. Price comparisons are made between American prices of these imports and foreign market value of the same products.⁴² If the price of a United States import, as determined by the foreign exporter and United States importer, is less than the foreign market value, then dumping exists.⁴³ The antidumping law is administered by the Commerce Department and the ITC. The International Trade Administration (ITA) at Commerce determines whether there are the economic sales at less than fair value (LTFV), and the ITC makes the material injury determination.

Investigations are instituted either by the ITA on its own motion, or by submission of a petition from an interested party, which the ITA then reviews and accepts.⁴⁴ The ITC does not have authority to self-initiate an antidumping investigation. Thus, a petition through a third party must allege the elements necessary for an antidumping finding.⁴⁵ The law requires a finding that foreign merchandise is being, or is likely to be, sold in the United States at less than fair value. Additionally, there must be a finding that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded by reason of imports of that merchandise.⁴⁶ If these criteria are satisfied, then a dumping duty is imposed. This duty is equal to the price difference between the price to the United States market and the foreign market value.⁴⁷ It is the ITC which makes the injury determination.⁴⁸

Since one of the requirements for relief is injury to a "domestic industry," the decision as to what constitutes the domestic industry can have a direct effect on the outcome of the investigation. The domestic industry is generally defined as all domestic producers of a like product.⁴⁹ Defining the industry in broad terms reduces the impact of imports, and thereby reduces the likelihood of an injury determination. On the other hand, limiting the definition of an industry increases the impact of dumped imports and increases the likelihood of an injury determination.⁵⁰

41. 19 U.S.C. § 1673 (1980).

42. 19 C.F.R. §§ 353.3-353.7 (1984).

43. 19 U.S.C. § 1673 (1980).

44. 19 U.S.C. § 1673a (1980).

45. 19 U.S.C. § 1673a(b)(1) (1980).

46. 19 U.S.C. § 1677 (1980); 19 C.F.R. §§ 207.26, 207.27 (1984).

47. 19 U.S.C. § 1673e(a)(1) (1980).

48. 19 U.S.C. § 1673b(a) (1980).

49. 19 U.S.C. § 1677(4) (1980).

50. 1 H. KAYE, P. PLAIA & M. HERTZBERG, *INTERNATIONAL TRADE PRACTICE* § 18.07 (1984).

It is the ITC's dumping jurisdiction which has the most severe impact on commercial transactions. This impact is evidenced in two distinct instances. The first case is one in which commercial transactions are affected and shaped by the mere *possibility* or *potential* for the imposition of antidumping duties by the ITC. The second case involves transactions in which actual duties have been imposed on an article subsequent to a finding by the ITC.

The mere possibility of imposing antidumping duties may directly affect commercial transactions. Imports generally decrease during a dumping investigation as importers seek a domestic source for their purchases.⁵¹ Because the importer of record in the United States is legally liable for whatever dumping duties are imposed,⁵² it is advisable in long-term contracts to provide for the possibility of dumping duties. Such provisions would be especially prudent whenever either the buyer or the seller is aware that there are marked differences between the home market price of an imported item and the United States market price.

An international commercial transaction may also be structured to anticipate a dumping order by providing that the contract itself will be rendered unenforceable in the event dumping duties are imposed. A clause relieving a party of performance in the event of dumping duties can be essential in the event one party is forced to bear the added cost. While attempts have been made in the past to resort to the standard "force majeure" provisions as covering dumping duties, the preferred and safer approach has been to *expressly* provide for relief from performance in the event of onerous dumping duties.⁵³ There appear to be no court decisions in the United Kingdom or United States interpreting "force majeure" as covering dumping duties.

With regard to preventative or anticipatory actions affecting commercial transactions, it is important to note that parties are increasingly examining their home market and foreign sales prices prior to contract to eliminate the possibility that dumping duties will be imposed once the sale is complete. Thus, an exporter is well advised to examine his home market prices and United States selling prices to determine whether any adjustments are needed to avoid the prospect of dumping duties prior to entering into a substantial contract.

A dumping order will severely reduce imports immediately upon

51. ROSSIDES, *supra* note 11, at 425.

52. 19 U.S.C. § 1673 (1980).

53. ROSSIDES, *supra* note 11, at 451. Other avenues of protection from an importer against assessment of dumping duties include indemnification, suspension of orders, or request for price modifications.

imposition of the duty.⁵⁴ Experience in administering antidumping laws indicates that imports are severely affected not only in instances with high dumping margins, *i.e.*, over fifty percent, but also in the case of much lower margins.⁵⁵ Simply stated, the amount of extra duty imposed as a result of a dumping order often renders the product uncompetitive in the United States market and, hence, results in cessation or drastic reduction of imports.

A dumping order generally applies only to exports from one country.⁵⁶ Accordingly, in many cases sources of imported goods will shift from the country affected by the dumping order to other foreign suppliers not included in the dumping finding.⁵⁷ Similarly, United States importers will often look to other foreign producers for their purchases. This was the exact situation in the color television receivers case.⁵⁸ There, Japanese exports declined dramatically, but were paralleled by an increase in imports from Korea and Taiwan, two countries not affected by the dumping order. The same shifting pattern also occurred in the case of acrylic sheet.⁵⁹ Imports from Japan dropped sharply as a result of the imposition of dumping duties on imports of acrylic sheet, while imports from Taiwan rose steadily. The rise in acrylic sheet imports from Taiwan was followed by an antidumping investigation into its pricing practices. That investigation resulted in an ITC determination of no injury to the domestic industry and the case was terminated.⁶⁰ It is important to note that dumping duties may not be avoided by transshipment of goods through a third party or third country; any transshipment would be subject to dumping duties.⁶¹

The impact on commercial transactions begins even before a final antidumping determination. Once liquidation of entries is withheld, the importer may be liable for all dumping duties assessed. When a final determination is made, the importer must provide a cash deposit upon importation equal to the initial margin determined.⁶² In other words, the amount to be deposited represents the difference between the price to the United States market and the

54. This has been the case with several dumping investigations. In the case of *Synthetic L-Methionine*, Japanese imports ceased entirely after the imposition of dumping duties. See *Synthetic L-Methionine From Japan*, Investigation No. AA 1921-115, TC Pub. No. 578 (1973).

55. Macrory & Reade, *Fair Value Investigations Under the Antidumping Statute*, in *MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW* III-14 (1984).

56. 19 U.S.C. § 1673 (1980). Dumping orders can apply only to countries found in violation of law. Therefore, unless more than one foreign market is involved in less than fair value determination, only one country is subject to a dumping order.

57. *Television Receiving Sets from Japan*, 36 Fed. Reg. No. 16,614 (1971).

58. *Id.*

59. *Acrylic Sheet from Japan*, 41 Fed. Reg. 32,294 (1976).

60. *Acrylic Sheet from Taiwan*, 49 Fed. Reg. 22, 896 (1984).

61. 19 U.S.C. § 1677 (12) (1980).

62. 19 U.S.C. § 1673d (1980); 19 C.F.R. §§ 353.48, 353.49 (1984).

price in the foreign market. Thereafter, the ITA at Commerce is required to conduct an annual review of imports subject to the dumping order to determine the actual amount or margin of dumping for goods that have been imported subsequent to the dumping order.⁶³ Final antidumping duty liability is not established until the annual review is completed for a given time period. Liability is determined on an import by import basis. This requires that each United States sale is compared with the foreign market value at about the time the product involved in the United States sale was exported. Any difference between the dumping duty deposit and the actual duty is charged to the importer. Based on the antidumping procedures, once dumping margins are determined for purposes of the deposit requirement on specific imports, there is no guarantee that the same duty or duties will be imposed in the future for purposes of a final determination.⁶⁴

An affected exporter can reduce the margin of dumping on individual transactions and in subsequent annual reviews. The most fundamental alternative available to an exporter is to adjust home market prices or the United States sales price to reduce or eliminate any differences.

B. Countervailing Duties—Section 701 Investigations

Whereas the antidumping law focuses on action by the private sector, countervailing duty law⁶⁵ concentrates on actions of foreign governments, as well as on the actions of private parties. Countervailing duty law is directed at subsidies in the form of bounties or grants paid or bestowed by governments on dutiable merchandise imported into the United States. Subsidies paid directly or indirectly in the course of manufacture, production, or exportation are countervailable.⁶⁶

The law permits initiation of an investigation by the ITA on its own motion or by the petition of an interested party on behalf of an industry.⁶⁷ The investigation usually takes about nine months to one year to complete. The ITA determines whether a subsidy exists, and the ITC makes a final determination of whether a domestic industry is materially injured. There are a number of preliminary determinations to be made,⁶⁸ and the deadlines for each aspect of the investi-

63. Tariff Act of 1930, *supra* note 9, at § 751 (codified at 19 U.S.C. § 1675 (1980)).

64. 19 U.S.C. § 1673e(b)(2) (1980).

65. Tariff Act of 1930, § 701 (codified as amended at 19 U.S.C. § 1303 (1980)).

66. *Id.*

67. 19 U.S.C. § 1671a (1980).

68. 19 U.S.C. § 1671(b) (1980); See Feller, *Countervailing Duty Law: Commerce Department Investigations* in *MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW* II-9 (1984) [hereinafter cited as Feller].

gation are fairly exacting in terms of the quantity of information which must be obtained and analyzed by the ITC.⁶⁹

Within seven days of an ITC final determination of injury to a domestic industry, the ITA orders Customs to begin collecting countervailing duties on merchandise under investigation. The duty imposed is based on the amount of the net subsidy determined to exist.⁷⁰

Like antidumping determinations, countervailing duty findings may have a severe impact on commercial transactions. In the case of countervailing duties, however, there is substantially less that an individual exporter can do to control or avoid the impact of an adverse finding. Frequently, a foreign producer who is aware that he is receiving some form of governmental assistance with respect to a product exported to the United States will seek advice as to whether this assistance could be regarded as a countervailable subsidy under United States law. Should it be determined that the subsidy is a countervailable one, the producer may either continue receiving the subsidy or terminate receipt thereof.

Once countervailing duties are imposed, the exporter is able to do little other than terminate receipt of the subsidy or offset the duties imposed. Many times, especially with respect to recent countervailing cases, the matters have been resolved by agreements between the United States Government and the foreign government involved, without the need to assess countervailing duties.⁷¹ In some cases, the government-to-government negotiations lead to an agreement whereby the foreign government agrees to impose an export tariff to offset the amount of the subsidy found.⁷² In other instances the agreement requires imposition of a quantitative limit on the level of exports.⁷³

In the recent and widely publicized steel countervailing cases, the option selected by the United States was the negotiation of wide-ranging quantitative restrictions on imports of steel.⁷⁴ Imposition of quantitative restrictions can often result in substantial decreases in the amount of affected goods imported into the United States. Even without such an agreement, the impact of restrictions usually results

69. Feller, *supra* note 68, at II, App. A-1.

70. 19 U.S.C. § 1671c(a) (1980).

71. 19 U.S.C. §§ 1671c(b), 1671c(c)(3) (1980).

72. Refrigeration Compressors from Singapore, 48 Fed. Reg. 51,167 (1983) (countervailing duty investigation suspended pursuant to agreement to offset or eliminate completely all benefits provided by government of Singapore).

73. Frozen Concentrated Orange Juice from Brazil, 48 Fed. Reg. 8839 (1983). Brazil and the United States entered into an agreement whereby Brazil, *inter alia*, will limit its exports of frozen orange juice to the United States.

74. Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 25,318 (1984). Certain Carbon Steel Products from Argentina, Australia, Finland, South Africa, and Spain, 49 Fed. Reg. 13,442 (1984).

in substantial decreases in the amount of affected goods imported into the United States. For example, in the case of carbon steel from Brazil, a countervailing duty determination resulted in a reduction of exports to less than one-half the level of exports prior to the countervailing order.⁷⁵

It is undisputable that an injury determination by the ITC in either an antidumping or countervailing duty investigation portends reductions in imports of a significant magnitude in many cases. A timetable for completion of these investigations is attached as Appendix A.

C. *Unfair Imports—Section 337 Investigations*

Section 337 of the Tariff Act of 1930⁷⁶ makes unlawful any unfair methods of competition and unfair acts in the importation or sale of articles into the United States. Section 337 applies to sales by the owner, importer, consignee, or agent of either. In order to constitute a violation of section 337, the effect or tendency of the unfair act must be to destroy or substantially injure an efficiently and economically operated industry in the United States, or to prevent establishment of such an industry, or to restrain or monopolize United States trade and commerce.⁷⁷ The ITC is authorized to investigate allegations of such unfair practices and to determine their existence.⁷⁸ More than two hundred investigations have been instituted under section 337 since it was amended by the Trade Act of 1974 to grant authority to the ITC for determination of violations.⁷⁹

In order for the ITC to find a violation, the complainant, usually a private United States firm, must show an unfair act or practice.⁸⁰ Ordinarily, the unfair practice has been infringement of a United States patent, copyright, or trademark. In some situations, however, practices such as misappropriation of trade secrets, deceptive pricing, false labeling or mislabeling, false advertising, product simulation, false designation of origin, and exclusive sales contracts have been considered unfair.⁸¹

75. *Certain Carbon Steel Products from Brazil*, *supra* note 74.

76. 19 U.S.C. § 1337 (1980).

77. 19 U.S.C. § 1337(a) (1980).

78. 19 U.S.C. § 1337(b)(1) (1980).

79. U.S. International Trade Commission, Dockets Branch (statistics as of Fall 1984).

80. 19 U.S.C. § 1337(a) (1980). The other three elements to prove are that there is a domestic industry, that the domestic industry is efficiently and economically operated, and that there has been injury to this industry as a result of imports.

81. 19 U.S.C. § 1337(a) (1980). § 1337(a) refers merely to unfair imports, and does not limit the kinds of unfair trade practices that can be brought under the statute. *See* *Certain Surface Grinding Machines and the Literature for Promotion Thereof*, 47 Fed. Reg. 2957 (1982)(false designation of origin.); *Pump Top Insulated Containers*, 44 Fed. Reg. 65,824 (1979) (the passing off of goods); and *Certain Apparatus for the Continuous Production of Copper Rod*, 44 Fed. Reg. 69,041 (1979) (trade secrets).

Furthermore, the unfair practice must be in the importation of an article, or in its sale by a United States owner, importer, consignee, or agent of either.⁸² Sales have generally included the actions of importers and the first resale after importation. The complainant must also produce evidence of a United States industry which is efficiently and economically operated and whose activities involve the product in question or the creation of an industry for that product.⁸³ Finally, the effect or tendency of the unfair practices must be to injure or prevent establishment of a United States industry, or to restrain or monopolize trade and commerce in the United States.⁸⁴

Proceedings at the ITC under section 337 are conducted on an adversarial basis subject to the Administrative Procedure Act.⁸⁵ The entire trial and ITC decision must be completed within one year of institution of the investigation and within eighteen months for cases deemed more complicated.⁸⁶

If the ITC finds a violation of section 337, it may direct that the foreign articles be excluded from entry into the United States.⁸⁷ An exclusion order generally applies to all like products from all producers in all countries, even though such producers were not specifically investigated. This is especially significant when there is a multiplicity of parties.

In *Certain Cube Puzzles*,⁸⁸ complainant alleged infringement of common-law trademark, false representation, and passing off. The Commission ordered a general exclusion of the infringing cube puzzles and packaging. During the sixty-day Presidential review period the infringing articles were entitled to entry under bond in the amount of 600 percent of the articles' entered value. A general exclusion order was permitted in light of the large number of unauthorized users and the patterns of distribution established by the complainant against seven respondents.

Additionally, the ITC may issue interim temporary exclusion orders if it has reason to believe, but has not finally determined, that there is a violation of section 337.⁸⁹ The ITC may also issue cease

82. 19 U.S.C. § 1337(a) (1980).

83. 19 U.S.C. § 1337(a) (1980). The Commission held that based on a finding of no domestic industry there was no violation in *Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles*, 47 Fed. Reg. 47,705 (1982) (*Toy Vehicles*). The Complainants in *Toy Vehicles* admitted to manufacturing the product at issue in Hong Kong, though they argued that certain business activities, such as promotion and advertising conducted in the United States, should be sufficient to constitute a domestic industry under the law. The Commission disagreed and no protection was available.

84. 19 U.S.C. § 1337(a) (1980).

85. 19 U.S.C. § 1337(c) (1980).

86. 19 U.S.C. § 1337(b)(1) (1980).

87. 19 U.S.C. § 1337(d), (e) (1980).

88. *Certain Cube Puzzles*, 48 Fed. Reg. 537 (1983).

89. 19 U.S.C. § 1337(e) (1980).

and desist orders.⁹⁰ Parties adversely affected by a final determination of the ITC in a section 337 investigation may appeal to the United States Court of Appeals for the Federal Circuit.⁹¹

Section 337 is potentially one of the harshest remedies available under United States law. It is equal to an injunction against importation. The impact of such an exclusion order upon ongoing commercial transactions is readily apparent.

Cases also may be terminated upon motion of the parties on the basis of settlement agreements or consent orders.⁹² This method of resolution usually requires cessation of the allegedly infringing activity. The effect on importers can be dramatic since all infringing articles are eliminated. Importers are required to find new sources of supply, while manufacturers are assured that their products are protected from unfair methods of competition.

If there is or could be a question of the infringement of a United States patent, copyright, or trademark, an exporter would be well advised to obtain an analysis of all legal rights pertaining to the merchandise sought to be exported to the United States. Much as is the case with antidumping actions, an importer or exporter who suspects that there may be a problem with the imported merchandise may choose to negotiate contractual language for indemnification, holding harmless, or rescission of the contract should an exclusion order be issued under section 337.

Upon issuance of an exclusion order, the foreign exporter's only remedy is to make certain modifications in the product, practice, or other unfair act to avoid infringement. Alternatively, the exporter may enter into a licensing agreement with the complainant.

Section 337 has become the favored vehicle to stop importation of articles involved in intellectual property rights disputes, such as those including trademarks, patents, and copyrights. A timetable for section 337 investigations is attached as Appendix B.

D. Escape Clause—Section 201

An escape clause action under section 201 of the Trade Act of 1974⁹³ provides temporary import relief when it can be demonstrated through an ITC investigation that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or a threat thereof to a domestic industry producing similar or directly competitive articles. The issue of simi-

90. 19 U.S.C. § 1337(f) (1980).

91. 19 U.S.C. § 1337(c) (1980 & Supp. 1984).

92. 19 C.F.R. § 210.51 (1984) (settlement agreements); 19 C.F.R. 211.21 (1984) (consent orders).

93. 19 U.S.C. § 2251 (1980).

larity or competitiveness, and almost every other facet of the law, has been the subject of extensive debate before the ITC. These debates have led to fairly refined definitions for each of the elements necessary to bring an escape clause action.⁹⁴

The provisions of section 201 provide flexible forms of relief and assistance to domestic industries which are being injured by import competition. The goal of section 201 is not to provide a permanent sanctuary for domestic industries, rather it is designed to provide a form of temporary assistance so that workers and firms can adjust to the increased imports which have had an injurious effect.⁹⁵ The President makes a final decision concerning import relief based on the ITC's recommendation. Interpretation of section 201 by the ITC can determine an industry's future as it relates to import competition.⁹⁶

An escape clause action may be initiated by any interested party in the private sector, as well as by the President, Congressional Committees overseeing trade activities, or upon the ITC's own motion.⁹⁷ The ITC has six months in which to conduct its investigation. The President has sixty days to review the recommendation and make a decision.⁹⁸ If the injury standard is met,⁹⁹ the President may provide one of the following remedies: an increase in the rate of duty; an imposition of import quotas; a proclamation of a tariff-rate quota; the establishment of orderly marketing agreements; or any combination of the above.¹⁰⁰ The President is required to provide import relief unless "he determines that provision of such relief is not in the national economic interest of the United States."¹⁰¹

The effect, then, of a decision against a foreign manufacturer or exporter of a section 201 investigation may be severe. Import relief may continue up to five years, with the possibility of a three-year extension.¹⁰² The case of *Footwear*¹⁰³ is illustrative of the consequences of import relief remedies under section 201. In 1977, as a result of a section 201 investigation case, the United States entered into an Orderly Marketing Agreement (OMA) with Taiwan and Korea which imposed a limit on the number of shoes that could be ex-

94. Easton, *Temporary Relief from Import Competition Under Section 201 of the Trade Act of 1974, the 'Escape Clause'*, in *MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW* VI-16 (1984).

95. 19 U.S.C. § 2253(h) (1980).

96. Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 *IND. L.J.* 535, 536 (1977).

97. 19 U.S.C. § 2251(b)(1) (1980).

98. 19 U.S.C. § 2252(b) (1980).

99. *Id.*

100. 19 U.S.C. § 2253(a) (1980).

101. 19 U.S.C. § 2252(a)(1)(A) (1980).

102. 19 U.S.C. § 2253(h)(1), (2) (1980).

103. *Nonrubber Footwear*, *supra* note 20.

ported to the United States.¹⁰⁴ As a result of this OMA, the volume of exports dropped sharply from these two countries, and soon after trade from European countries to the United States increased. When the OMA terminated overall imports increased. The domestic footwear industry quickly filed another section 201 petition with the ITC in 1984. The ITC determined that the industry did not meet the criteria for relief and no recommendation was presented to the President.¹⁰⁵

The ITC has decided, however, that the steel and copper¹⁰⁶ industries merit relief. In the case of steel, the ITC has recommended a combination of quotas and additional duties.¹⁰⁷ Decisions by the President on whether to grant relief on these articles were timed to coincide with the November elections and thereby guarantee a controversy.

E. Nonmarket Economies—Section 406

Section 406 of the Trade Act of 1974¹⁰⁸ was designed to protect the domestic industry from potential negative effects of permitting trade with Communist countries.¹⁰⁹ This provision was designed to respond to the problems typically associated with trading in nonmarket economies.¹¹⁰ The procedural aspects of section 406 are quite similar to those in section 201.¹¹¹ Like section 201, any interested party may file a petition for relief. The ITC's responsibility is to determine whether imports from a Communist country are causing market disruption in the domestic industry. Market disruption is defined as existing "within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat thereof, to such domestic industry."¹¹²

Unlike the "substantial cause" criteria necessary to be met in a section 201 investigation, section 406 requires only that imports be a

104. Nonrubber Footwear Imports, Presidential Proclamation 4510, 42 Fed. Reg. 32,429 (1977).

105. *Nonrubber Footwear*, *supra* note 20.

106. *Unwrought Copper*, *supra* note 20.

107. *Carbon and Certain Alloy Steel Products*, *supra* note 20.

108. 19 U.S.C. § 2436 (1980).

109. S. REP. NO. 1298, 93d Cong., 2d Sess. 1210, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186.

110. *Id.* at 7342. Congressional concern was due to the fact that through control of the distribution process and the price at which articles are sold, [A Communist country] could disrupt the domestic markets of its trading partners and thereby injure producers in those countries. In particular, exports from communist countries could be directed so as to flood domestic markets within a shorter time period than could occur under free market condition[s].

111. 19 U.S.C. § 2251 (1980).

112. 19 U.S.C. § 2436(e)(2) (1980).

significant cause of material injury.¹¹³ *Significant* is defined as market disruption.¹¹⁴ Also, the injury standard in section 406 is *material injury* rather than the *serious injury* required in a section 201 investigation.¹¹⁵

Finally, the ITC has only three months in which to conduct a section 406 investigation and report to the President with a recommendation.¹¹⁶ Available relief is the same as that offered under section 201, with the exception of adjustment assistance, which is unavailable under section 406, and the fact that remedies apply only to Communist countries found to be causing market disruption.¹¹⁷ Perhaps even more so than in a section 201 investigation, diplomatic considerations are of importance in the President's decision on import relief, and can further affect a remedy under section 406.¹¹⁸ In turn, the potential impact of ITC decisions can be lessened by the President's determination not to impose any relief based on political considerations.

F. Fact Finding—Section 332 Investigations

The ITC conducts fact finding investigations under section 332 on matters of concern to the government and the public involving international trade issues. Investigations may be requested by the President, the House Committee on Ways and Means, and the Sen-

113. See textual quote accompanying note 112 *supra*.

114. *Id.*

115. The Commission held that market disruption did not exist in the investigation of ferrosilicon from the Union of Soviet Socialist Republics, 49 Fed. Reg. 4857 (1984). Though the ITC found that imports were increasing and that domestic ferrosilicon producers were suffering material injury, they did not find that such imports were a significant cause of material injury or threat thereof. The ITC has interpreted § 406 to require a causal relationship between imports and injury. See Anhydrous Ammonia from the USSR, 44 Fed. Reg. 61,269 (1979).

116. 19 U.S.C. § 2436(a)(4) (1980).

117. 19 U.S.C. § 2436(a)(1)-(3) (1980); *Anhydrous Ammonia from the USSR*, *supra* note 115.

118. See Presidential Memorandum Concerning Anhydrous Ammonia from the USSR, 44 Fed. Reg. 71,809 (1979); Presidential Proclamation 4714 Concerning Certain Anhydrous Ammonia from the USSR, 45 Fed. Reg. 3,875 (1980). President Carter found that there are reasonable grounds to believe, with respect to imports of anhydrous ammonia from the Union of Soviet Socialist Republics (U.S.S.R.) provided for in items 417.22 and 480.65 of the Tariff Schedules of the United States (TSUS), that market disruption exists with respect to articles produced by a domestic industry and that emergency action is necessary.

2. Recent events have altered the international economic conditions under which I made my determination that it was not in the national interest to impose import relief on anhydrous ammonia from the U.S.S.R. as recommended by the United States International Trade Commission (USITC) on October 11, 1979. However, the factual basis upon which the USITC made its determination of market disruption still exists . . . [Thus], this proclamation *shall* be effective as to articles entered, or withdrawn from warehouse, for consumption on or after the third day following the date of publication of this Proclamation in the Federal Register and shall remain in effect for one year . . . (emphasis added).

Id.

ate Committee on Finance. The ITC may also self initiate an investigation.¹¹⁹ The ITC determines the length of time necessary to complete an investigation and can hold public hearings to further assist them in preparing their report.¹²⁰

A section 332 investigation may focus on the administration, fiscal, and industrial effects of the customs laws of this country, as well as the following: tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, effects of export bounties and preferential transportation rates, volume of importations compared with domestic production and consumption, conditions, causes, and effects relating to competition of foreign industries with those of the United States.¹²¹ Additionally, the ITC has devoted many years both to an analysis of the conversion of the Tariff Schedules to the Harmonized Code System and to the actual conversion of the system.

Section 332 investigations do not have an independent effect on commercial transactions in that there is no relief available as a result of an investigation. However, the ITC reports prepared in conjunction with a section 332 investigation are frequently the only authoritative analysis available concerning a particular subject matter. In the case of counterfeiting,¹²² the ITC's report has been cited repeatedly by Congressional proponents of restrictive legislation aimed at counterfeiting.¹²³ Clearly, an industry or practice under investigation in a foreign country will have indications of possible future trade actions which may be pursued against them as a result of the section 332 fact finding investigation and may, therefore, take certain anticipatory measures to eliminate the likelihood of a remedy against them under a different section of the law.

IV. Conclusion

The effect of ITC decisions on commercial transactions varies depending on which of several statutory provisions is utilized. Some of the more severe consequences of ITC decisions were witnessed in the cases of footwear, steel, and color television receivers.¹²⁴ ITC determinations may affect existing transactions by eliminating sources

119. 19 U.S.C. § 1332(a), (g) (1980).

120. 19 U.S.C. § 1333 (1980).

121. 19 U.S.C. § 1332(a)-(d) (1980).

122. EFFECTS OF FOREIGN PRODUCT COUNTERFEITING, *supra* note 31.

123. The following counterfeiting legislation was introduced subsequent to the ITC report: Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS 2178; S. 875, 98th Cong., 2d Sess. (1984); H.R. 6071, 98th Cong., 2d Sess. (1984); and H.R. 5532, 98th Cong., 2d Sess. (1984).

124. *Carbon and Certain Alloy Steel Producers*, *supra* note 20; *Nonrubber Footwear*, Investigation No. TA-201-7, *supra* note 104; *Television Receiving Sets from Japan*, *supra* note 57.

of supply under section 337, increasing the rates of duties required for entry of articles under sections 701, 731, 406, and 201, and generally causing attention to focus on an industry and its competitive situation under section 332. In many instances, the long-term effects are both the harshest and the most difficult to predict. In sum, the best primary tools available to parties in international commercial transactions to avoid the impact of ITC decisions are those of careful preparation and continuous monitoring of ITC activity. With some forethought and planning, the impact of ITC decisions can be minimized significantly.

V. Appendix

A. Attachment A

Timetable for Antidumping Investigations

Preliminary LTFV Sales and Injury Determinations

Day	Agency	Action
1	ITA & ITC	Petition filed.
20	ITA	Determination concerning sufficiency of petition. ¹²⁵
45	ITC	Determination concerning reasonable indication of material injury (preliminary injury determination). ¹²⁶
90		Preliminary LTFV sales determination—(a) 90 days if a waiver of verification (§ 733(b)(2));
160	ITA	(b) 160 days if no
210		waiver (§ 733(b)(1); (c) 210 days in complicated cases (§ 733(c)). If determination is affirmative, SUSPENSION OF LIQUIDATION OCCURS AND FUTURE ENTRIES POTENTIALLY LIABLE FOR DUMPING DUTIES.

125. If negative, the petition is dismissed and the ITC investigation is terminated.

126. If negative, the investigation is terminated.

Final LTFV Sales and Injury Determinations
(days measured from preliminary determination)

Day	Agency	Action
75	ITA	Final LTFV sales determination ¹²⁷
135		(a) 75 days after a preliminary determination (general rule—§ 735(a) (1)); except (b) 135 days if an extension at the request of exporters or petitioners (§ 735(a) (2)).

B. Attachment B

Timetable for Typical Section 337 Investigation¹²⁸

Month	Action
1	Investigation instituted with published notice within 30 days after receipt of complaint. Responses from domestic parties charged with violation due within 20 days of the date of service of the complaint and notice of investigation and responses from foreign parties are due within 30 days of the date of service of the complaint and notice of investigation.
2	Preliminary discovery conference held and discovery begins.
3	Hearing on Temporary Exclusion Order (TEO) must be completed within 3 months from the date of publication in the Federal Register of notice of investigation.
4-5	Discovery continues.

¹²⁷ If negative, the investigation is terminated and there is no final Commission injury investigation.

¹²⁸ If a section 337 investigation is declared "complicated" by the International Trade Commission, the Commission's final decision may be rendered up to 18 months after the investigation is instituted, as opposed to the usual requirement of 1 year, and the timetable set forth would be set off by several months.

Initial Determination of Administrative Law Judge (ALJ) on TEO due within 4 months of notice of investigation. Becomes determination of ITC 15 days later and TEO issued unless appealed to full ITC and it accepts appeal. If TEO issued, importation under bond can continue pending final determination.

- 6 Discovery concluded.

 Hearing memorandum, witness lists, exhibits list due.
- 7 Prehearing Conference followed immediately by hearing on Permanent Exclusion Order (PEO) which hearing must be concluded within 7 months of notice of investigation.

 ITC decision on any appeal from ALJ Initial Determination on TEO due within 60 days of Initial Determination. If violation found, TEO issued.
- 8 Post hearing briefs to ALJ.
- 9 ALJ Initial Determination on PEO due within 9 months of notice of investigation.
- 10 ALJ Initial Determination on PEO becomes determination of ITC 30 days after issuance and PEO issued unless initial determination appealed to ITC and it accepts appeal.
- 11 Briefs and oral argument before ITC on any appeal regarding PEO.
- 12 Determination of ITC on any appeal regarding PEO, and if violation found, PEO issued.
- 14 ITC determination becomes final, and subject to judicial appeal if President does not disapprove ITC finding of violation within 60 days from date on which President receives ITC determination.

Importation under bond can be made during the 60-day Presidential Review period.

